80-696

FILED
OCT 27 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

AMERICAN TRANSFER AND STORAGE COMPANY,
Petitioner,

v.

RAYMOND J. BROWN,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

CARL DAVID ADAMS
ADAMS, MIMS & VORPAHL
Campbell Centre II, Suite 255
8150 North Central Expressway
Dallas, Texas 75206
(214) 750-0171
COUNSEL FOR RESPONDENT

October 24, 1980

INDEX

	Page
Statement of the Case	1
Reasons Why the Writ Should Be Denied	2
Argument and Authorities	3
Conclusion	12
Certificate of Service	13

CITATIONS

	Page
Cases:	
Adams Express Company v. Croninger, 226 U.S. 491, 57 L.Ed. 314, 36 S.Ct. 148 (1912)	5
American Transfer & Storage Company v. Brown, 584 S.W.2d 284 (Tex. Civ. App., Dallas, 1979) and 601 S.W.2d 931 (Tex. 1980)	5, 6, 7, 10
Askew v. American Waterways Operator, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973)	8
City of Philadelphia v. State of New Jersey, 437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978)	9
Douglas v. Sea Coast Products, Inc., 431 U.S. 265, 52 L.Ed.2d 304, 97 S.Ct. 1740, (1977)	8
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210, (1963)	7, 8
Huron Portland Cement Company v. City of Detroit, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960)	8
Jones v. Rath Packing Company, 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977)	7
Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947)	7
U.S. v. Bass, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971)	7
Statutes:	
49 U.S.C. § 20(11)	5
Texas Business and Commerce Code Sections 17.42-17.50	3, 4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

AMERICAN TRANSFER AND STORAGE COMPANY,

Petitioner,

v.

RAYMOND J. BROWN,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Raymond J. Brown, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Texas' opinion in this case. That opinion is reported at 601 S.W.2d 931 (Tex. 1980).

STATEMENT OF THE CASE

Respondent, Raymond J. Brown, disagrees with the Statement of the Case found on Pages 3-6 of the Petition for Writ of Certiorari filed by American Transfer and Storage

Company. In Petitioner's Statement of the Case, the important and salient details giving rise to Petitioner's liability are completely omitted. Rather, much of the Statement of the Case is devoted to recitations concerning the issuance of an Order for Services and the Bill of Lading. Additionally, undue attention is given to facts which were not important to Respondent's cause of action. The factual summary contained in the Petition creates the misimpression that Respondent's recovery arose out of an interstate contract of carriage and the documents related thereto. This is not a correct statement of the facts giving rise to liability in this case.

Respondent sued Petitioner solely upon the theory that its statements and representations made prior to the decision by Respondent to employ Petitioner as a carrier were violative of the Texas Deceptive Trade Practices — Consumer Protection Act. This distinction, and the importance thereof, is recognized in the opinions of both the Supreme Court of Texas and the Court of Civil Appeals. The significance of this misplaced emphasis of the facts permeates Petitioner's entire case and will be more closely addressed in Subpart C of this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

1. **The Texas statute in question does not govern or attempt to govern subject matters covered by the federal act in question.**
2. **There is no conflict between the Texas statute in question and the federal act in question.**
3. **The Texas statute in question is a legitimate exercise of the police power of the State of Texas to protect its citizens against consumer fraud and misrepresentations.**

4. **Respondent's recovery is not based upon a claim for damages to goods shipped in interstate commerce, but rather is based upon a claim for misrepresentations involved in a Texas consumer transaction.**

ARGUMENT AND AUTHORITIES

The points raised by Petitioner in its Petition concern the issue of federal preemption. Petitioner alleges that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Section 20(11), preempts any attempt by the State of Texas to prohibit false, misleading and deceptive trade practices occurring within the State of Texas in consumer transactions by persons whose liabilities for breach of interstate contracts of carriage are controlled by the Carmack Amendment. The argument of Respondent will be divided into three (3) subparts: (A) there can be no preemption because the state and federal statutes in question deal with different subject matters and do not conflict or overlap; (B) the state statute in question is a legitimate exercise of the police power by the State of Texas to protect its citizens against consumer fraud and misrepresentation; and (C) Respondent's recovery is based upon consumer misrepresentations occurring prior to the formation of any contract for interstate carriage, and is not a claim for breach of such interstate contract of carriage.

SUBPART A

There can be no preemption because the state and federal statutes in question deal with different subject matters and do not conflict or overlap.

The Texas Deceptive Trade Practices — Consumer Protection Act (embodied in the TEXAS BUSINESS AND COMMERCE CODE Sections 17.42-17.50), applies to false,

misleading and deceptive acts or practices in consumer transactions within the State of Texas.[1] The Texas statute prohibits a lengthy list of unlawful practices as being false, misleading or deceptive acts and practices. *(Section 17.46(b) §§1-23, TEXAS BUSINESS AND COMMERCE CODE).* Two (2) of these prohibited practices were found to have been violated in the case at bar by Petitioner. These sections are as follows:

> "The term "false, misleading, or deceptive acts or practices" includes but is not limited, to the following acts:
>
> * * *
>
> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have;
>
> * * *
>
> (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another". *TEXAS BUSINESS AND COMMERCE CODE, Sections 17.46(b)(5) and (7).*

The Texas statute does not purport to govern the transportation industry specifically or to set out any terms for

---

[1] "Consumer transactions" are defined by the act as any transaction wherein a consumer seeks or acquires goods or services (Section 17.45(4), *TEXAS BUSINESS AND COMMERCE CODE)* from any person engaged in trade and commerce i.e. the advertising, offering, or distribution of any good or service which directly or indirectly effects the people in the State of Texas. (Section 17.45(6), *TEXAS BUSINESS AND COMMERCE CODE.)*

recovery of damages to goods shipped in interstate commerce. The Texas courts in the case at bar have held that it deals exclusively with deceptive trade practices rather than interstate shipments or other transactions in interstate commerce. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App., Dallas, 1979) and 601 S.W.2d 931 (Tex. 1980).

The subject matter of the federal statute, on the other hand, is the liability of initial and connecting carriers for loss or damage to goods in interstate shipments, together with the issuance of bills of lading, contractual limitations of liability, and notice and filing of claims. (49 U.S.C. §20(11)). With regard to this subject matter, this Court has held that the federal legislation supercedes all state regulation of this field. *Adams Express Company vs. Croninger*, 226 U.S. 491, 57 L.Ed. 314, 36 S.Ct. 148 (1912).

In the present case, however, the Texas statute makes no attempt to regulate any of the matters regulated by the Carmack Amendment and does not present any obstacle to the full accomplishment of the uniformity sought by the Carmack Amendment with regard to the regulation of contracts of carriage in interstate commerce and claims arising out of such contracts. It was this distinction that led the Court of Civil Appeals and the Supreme Court of Texas to hold that protection of interstate shippers from deceptive trade practices was a subject which Congress chose to leave to the police powers of the several states. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App., Dallas, 1979), at 289 and 601 S.W.2d 931 (Tex. 1980) at 938.

The courts below held that the Carmack Amendment, though comprehensive in its regulation of contracts of car-

riage in interstate commerce, does not attempt to regulate misrepresentations or deceptive trade practices taking place prior to the formation of the contract for interstate shipment. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App. Dallas, 1979), at 289 and 601 S.W.2d 931 (Tex. 1980) at 938. The courts therefore reasoned that, in the absence of federal attempts to speak to the subject, it is a matter to be left to the states to regulate.

In summary, the Texas statute in question does not purport to govern carriers or their liabilities arising out of the contract of interstate carriage. Rather, the statute deals exclusively with false and misleading practices wherein Texas consumers are induced to enter into transactions through fraudulent and deceptive practices. Since this purpose is one which remains outside the ambit of the Carmack Amendment, it is clear that there is no attempt by the state and federal statutes to occupy or regulate the same fields of interest.

SUBPART B

The state statute in question is a legitimate exercise of the police power by the State of Texas to protect its citizens against consumer fraud and misrepresentation.

The Texas statute in question was inacted to "protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection". *Section 17.44, TEXAS BUSINESS AND COMMERCE CODE.* As such, it is clearly an attempt by the State of Texas to exercise its police power to safeguard

and protect its citizens from harm and loss visited upon them by the prohibited practices. Speaking to the application of the statute to the case at bar, the Supreme Court of Texas used the following language:

> "We also conclude that the DTPA's (Deceptive Trade Practices Act) prohibitions against false, misleading and deceptive acts protects a deeply rooted state interest and is an exercise of the right of the State of Texas to protect its citizens from acts such as those committed by American Transfer. *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210, (1963)". (explanation added). *Brown vs. American Transfer and Storage Company*, 601 S.W.2d 931 (Tex. 1980), at 938.

The regulation and control of consumer fraud and deceptive trade practices falls within a field which has been traditionally occupied by the states. As such, preemption should only be found if "that was the clear and manifest purpose of Congress". *Rice vs. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947). In such cases, this Court has indicated that a presumption in favor of the historic police powers of the states in these areas will not be superceded by federal law unless the purpose of Congress to do so is clear and manifest. *Rice vs. Santa Fe Elevator Corporation, supra.* This Court has recently stated that "this assumption provides assurance that 'the federal-state balance', *U.S. vs. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones vs. Rath Packing Company*, 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977).

In areas dealing with the health and welfare of a state or its citizens, this Court has repeatedly held that states and their instrumentalities may act concurrently with the federal

government even though such action involves certain areas of interstate commerce. In the case of *Huron Portland Cement Company vs. City of Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960), this Court upheld a city ordinance controlling smoke emissions which had come under attack as constitutionally preempted by the Federal Admiralty Extension Act. In sustaining the ordinance this Court stated:

> "The ordinance was inacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government". *Huron Portland Cement Company vs. Detroit, supra*, at 442.

In upholding the Detroit ordinance, this Court determined that local regulations may effect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. *Huron Portland Cement Company vs. Detroit, supra*, at 444.

These principals of law have guided this Court in numerous cases to conclude that federal and state law should be allowed to co-exist unless the express terms of the federal statute command otherwise or unless the state and federal statutes conflict to such an extent that they cannot stand concurrently. See *Askew vs. American Waterways Operator*, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973); *Douglas vs. Sea Coast Products, Inc.*, 431 U.S. 265, 52 L.Ed.2d 304, 97 S.Ct. 1740, (1977); *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 10 L.Ed2d 248, 83 S.Ct. 1210

(1963); *City of Philadelphia vs. State of New Jersey*, 437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978).

In the case at bar, the attempt by the Texas Legislature to clear the smoke of fraud and deceit from the commercial air in consumer transactions within the State of Texas can be compared with the Detroit ordinance in the *Huron* case, *supra*, and its attempt to clear smoke from the air. It certainly is inacted to protect the welfare of Texas citizens in the market place, and while it may apply to an interstate carrier who engages in these unlawful practices prior to the formation of the contract for interstate shipment, such application is not shown to be discriminatory against interstate commerce or to present any obstacle to the purposes expressed in the federal act in question. The State of Texas certainly has a legitimate state interest in protecting its citizens from deceptive practices of this nature. In the absence of an attempt by Congress to undertake national guidelines in the field of consumer protection in interstate shipments, the above cited cases dictate that these matters are left to the police powers of the several states for regulation and control.

SUBPART C

Respondent's recovery is based upon a claim for misrepresentations occurring prior to the formation of the contract for interstate carriage and is not a claim for damage to goods falling within the scope of the Carmack Amendment.

As has previously been noted in the Statement of the Case in this brief, Petitioner's Statement of the Case and presentation of Questions Presented For Review in its Petition, attempt to characterize the claim of Respondent as "a claim for damages to interstate shipment of goods" (see Questions Presented For Review, Number 1, at Page 2 of

Petitioner's Petition for Writ of Certiorari). Petitioner's error in this regard permeates the entirety of its case. Both the Court of Civil Appeals and the Supreme Court of Texas stated in their opinion that the claim of Raymond J. Brown was not one for damages to the goods shipped in interstate commerce, but, rather, was solely based upon the misrepresentations and false statements made by American Transfer and Storage Company's agent prior to the formation of the contract between Brown and American Transfer for the shipment of his goods.

The opinion of the Supreme Court of Texas, reproduced in its entirety in Subsection A of the Appendix of the Petition, states:

> "Brown contended the liability of the packing company rested solely on the DTPA and not on the contract of carriage. He alleged he had been induced into the contract for carriage by American Transfer's misleading and deceptive representations and because of the misrepresentations he had been damaged." *Raymond J. Brown vs. American Transfer & Storage Company*, 601 S.W.2d 931 (at Page A-18 of Petitioner's Appendix A).

The opinion of the Court of Civil Appeals in the case at bar likewise acknowledged the distinction between Respondent's cause of action and a claim for damages arising out of a contract for carriage. It stated:

> "Plaintiff asserts that his claim is not based on the contract of carriage or on any rule of carrier liability, under either statute or common law, but that it rests solely on the Texas Deceptive Trade Practices Act." *American Transfer & Storage Company vs. Raymond J. Brown*, 584 S.W.2d 284 (at B-10 of Petitioner's Appendix B).

Despite the repeated characterizations by Respondent and the Courts below of the cause of action as one for mis-

representation and consumer fraud as opposed to a claim for damages to goods shipped in interstate commerce, Petitioner refuses to acknowledge the distinction and the difference. Petitioner continues to maintain that the action is one for violation of an interstate contract of carriage, and hence falling within the terms of the Carmack Amendment. This mischaracterization by Petitioner only serves to more clearly define for the Court the differences between the Texas statute and the Federal legislation in question. Respondent's cause of action exists separate and apart from the contract of carriage and is totally unrelated thereto.

Petitioner mistakenly says that "Petitioner was not shown to have caused any loss of or damage to Respondent's goods". (see Petitioner's Brief Page 7). This is a misstatement of the record in the case. The jury's answers to Special Issues Two and Six (found in the opinion of the Court of Civil Appeals at Page B-27 and B-28 of Petitioner's Appendix B), clearly show that the jury found the misrepresentations to have been a producing cause of the damages to Raymond J. Brown. Despite being a factual misstatement of the case, this error points out the glaring oversimplification by Petitioner in the case at bar. The factual summary found in the opinion of the Supreme Court of Texas (on Page A-7 and A-8 of Petitioner's Appendix A), clearly indicates that Respondent's cause of action arose out of gross misstatements concerning the method of operation to be employed by American Transfer in the shipment. The jury found that these misrepresentations did cause Respondent's damages, without regard to proof of where the actual physical injury and damages occurred or in whose hands the goods were at the time of such damages. This jury finding of causation has never been attacked by Petitioner on any evidentiary grounds, and hence stands unchallenged.

The cases cited by Petitioner only lend further support to the distinction in the case at bar. All of the authorities cited by Petitioner deal with attempts by states, through legislation or interpretation of common law principals, to add to, alter, or in some form redefine the liability of carriers for loss of and damages to interstate shipments. As shown in Subpart A of this brief, the State of Texas has made no such attempt in the case at bar. The continued and persistent efforts of Petitioner to wrongfully characterize Respondent's claim as one for damages to goods shipped in interstate commerce as opposed to misrepresentation, should not be embraced by this Court.

In summary, the State statute in question deals with a subject matter not spoken to by the Federal statute, and is a legitimate exercise of the police power of the State of Texas. Federal preemption does not present itself in such a case. The continued insistence upon carrier liability by Petitioner cannot confuse the clear differences between the two statutes before the Court.

CONCLUSION

Based upon the foregoing authorities, Respondent prays that the Petition for Writ of Certiorari be denied, and that all costs associated with this matter be taxed against the Petitioner, American Transfer and Storage Company.

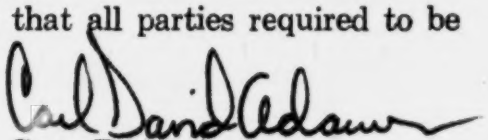
Respectfully submitted,

CARL DAVID ADAMS
ADAMS, MIMS & VORPAHL
Campbell Centre II, Suite 255
8150 North Central Expressway
Dallas, Texas 75206
(214) 750-0171

COUNSEL FOR RESPONDENT,
RAYMOND J. BROWN

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 1980, sufficient copies of the foregoing Brief in Opposition were mailed, postage prepaid to Duncan Boeckman, 2300 Republic National Bank Tower, Dallas, Texas 75201, Counsel for Petitioner. I further certify that all parties required to be served have been served.



CARL DAVID ADAMS
ADAMS, MIMS & VORPAHL
Campbell Centre II, Suite 255
8150 North Central Expressway
Dallas, Texas 75206
(214) 750-0171